

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEONTE DESHAWN PIPPEN,

Defendant-Appellant.

UNPUBLISHED

May 28, 2002

No. 230412

Oakland Circuit Court

LC No. 2000-172666-FC

Before: Smolenski, P.J., and Neff and White, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of armed robbery, MCL 750.529, raising three arguments: (1) the trial court erroneously denied defendant's request to excuse a potential juror for cause, (2) the prosecutor engaged in misconduct by denigrating defense counsel during rebuttal closing argument, and (3) cumulative error occurred. We affirm.

Defendant first argues that this Court should reverse his conviction and remand for a new trial because the trial court erroneously denied defendant's request to excuse a potential juror for cause. This Court applies an abuse of discretion standard when reviewing a trial court's ruling on a challenge for cause based on bias. *People v Williams*, 241 Mich App 519, 522; 616 NW2d 710 (2000), citing *People v Roupe*, 150 Mich App 469, 474; 389 NW2d 449 (1986). We will defer to the trial court's superior ability to assess from a venireman's demeanor whether the person would be impartial. *Williams, supra* at 522.

In the present case, a potential juror indicated during voir dire that she had "gun issues," i.e., that she had a problem with the allegation that defendant possessed a handgun during the robbery. Further, the potential juror indicated that it would bother her if defendant decided not to testify on his own behalf. On two separate occasions, the trial court asked the potential juror whether her feelings on these issues would influence her verdict. First, she replied, "I have mixed feelings, I don't know." Later, she simply replied, "Yes." However, after additional questioning by the trial court, the potential juror stated that she would be able to render a fair and impartial verdict. Defense counsel challenged the potential juror for cause under MCR 6.412(D)(1), arguing that she had exhibited a bias against the defendant. The trial court denied the motion, and defense counsel subsequently removed the potential juror with a peremptory challenge.

On appeal, defendant argues that he is entitled to a new trial because the challenged juror equivocated about her ability to be fair and impartial, demonstrating her bias more than twice. While the challenged juror did state that she had “gun issues” and that she had a problem with an accused’s right to remain silent, she also stated that those views would not influence her to the extent that she could not render a fair and impartial verdict. “A juror who expresses an opinion referring to some circumstance of the case which is not positive in character, but swears he can render an impartial verdict, may not be challenged for cause.” *Roupe, supra* at 474. We conclude that the trial court did not abuse its discretion in refusing to excuse the challenged juror for cause under MCR 6.412(D)(1).

Furthermore, even if the trial court had committed error in this regard, we would still be required to consider whether that error would merit reversal of defendant’s conviction. In *People v Legrone*, 205 Mich App 77, 81; 517 NW2d 270 (1994), this Court set forth a four-prong test to be applied when considering whether to reverse a defendant’s conviction based on a trial court’s refusal to excuse a potential juror for cause:

[I]n order for a party to seek relief in this instance, there must be some clear and independent showing on the record that: (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished later to excuse was objectionable. [Internal quotation omitted.]

After the trial court denied defendant’s motion to excuse the challenged juror for cause, defense counsel exercised a peremptory challenge to remove her from the jury. At that point, defendant had eight peremptory challenges remaining under MCR 6.412(E)(1). Although defendant did not subsequently attempt to exercise any challenges for cause, he did exhaust his remaining peremptory challenges. After he did so, the prosecutor exercised his fifth peremptory challenge, and a final juror was seated. Both the prosecutor and defense counsel passed on the opportunity to challenge that juror for cause. The trial court then offered the prosecutor an opportunity to exercise a peremptory challenge, which the prosecutor declined. At that point, the following exchange occurred:

[The Court:] I believe you have exhausted your challenges, counsel.

[Defense Counsel:] I believe so.

[The Court:] Count them.

[Defense Counsel:] Oh, I agree, your Honor.

[The Court: All right.] Clerk, swear in the jury.

Contrary to defendant’s argument, the trial court did not “specifically cut off any opportunity for the Defendant to have additional [peremptory] challenges.” Defendant never asked for additional peremptory challenges under MCR 6.412(E)(2), and the trial court did not prevent or discourage defense counsel from doing so. Instead, the trial court merely informed

defense counsel that he had exhausted all twelve of his peremptory challenges, and defense counsel agreed.

We conclude that defendant has failed to show reversible error under the four-prong test set forth in *Legrone, supra*. Although defendant did exhaust his peremptory challenges, he never demonstrated the desire to excuse a subsequently summoned juror. Further, defendant does not even argue that a subsequently summoned juror was objectionable. Therefore, defendant is not entitled to a new trial on this ground.

Defendant next argues that he is entitled to a new trial because the prosecutor improperly denigrated defense counsel in front of the jury. See *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997). We disagree.

Because defendant's trial counsel did not object to the prosecutor's remarks during rebuttal closing argument, this Court reviews this issue for plain error. "Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object; this Court will only review the defendant's claim for plain error." *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). To obtain relief under the plain error rule, a defendant must show the occurrence of a plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). This includes a showing that the error affected the outcome of the lower court proceedings. *Id.* Further, no error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Schutte, supra* at 721.

We review questions of prosecutorial misconduct case by case, considering contested remarks in context and evaluating them in light of defense arguments and their relationship to the evidence presented at trial. *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996). In the present case, we conclude that the prosecutor did not commit misconduct during rebuttal closing argument. Viewed in context, the prosecutor did not argue that defense counsel lied or was trying to intentionally mislead the jury concerning the facts. The prosecutor's remarks at issue here were made during rebuttal argument and, in essence, charged that the defense arguments did not comport with the trial evidence, and should be rejected for that reason. Defense counsel had argued that defendant participated in the robbery under duress. In addition, defense counsel had argued that the gas station attendant was wrong when she testified that defendant possessed a gun during the robbery. The prosecutor merely responded to defense counsel's arguments and the defense theory of the case. We conclude that the prosecutor did not personally attack defense counsel or shift the jury's focus from the evidence to defense counsel's personality. *Id.* at 498. Therefore, we do not find that the prosecutor's remarks were improper or that they denied defendant a fair trial. Further, because any prejudice caused by the prosecutor's comments could have been cured by a timely instruction, if defendant counsel had lodged an objection, defendant is not entitled to relief on this ground.

Finally, defendant argues that the cumulative effect of the above-mentioned errors requires reversal of his conviction. "As to any possible cumulative error, the test to determine whether reversal is required is not whether there are some irregularities, but whether defendant has had a fair trial." *People v Duff*, 165 Mich App 530, 539; 419 NW2d 600 (1987). Because

we find no individual errors, defendant is not entitled to relief under the cumulative error doctrine.

Affirmed.

/s/ Michael R. Smolenski

/s/ Janet T. Neff

/s/ Helene N. White